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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No 160

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

THE PIERCE GOVERNOR COMPANY, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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ARGUMENT

The positions taken by the Board and the Company in their briefs in opposition confirm that each of the two alternative grounds upon which the court below bases its

ruling that the Company was under no obligation to recognize the Local at the new location presents an important question of federal labor law (Questions No. 2(a) and (b) of the petition).*

1.

The first ground is that where an international union and its local constitute a joint bargaining agency, but only one holds an NLRB certification, the employer is *never* under an

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* As to Question No. 2, the Company contends that the conflict we claim between this case and *Cooper Thermometer Co. v. N.L.R.B.*, 376 F. 2d 684, 687-88 (2d Cir. 1967) (Pet., pp. 49a-60a, 53a-54a), is based on our erroneous assertion that here, as there, the Company said applicants from the old location would be considered for work at the new location on the same basis as all other applicants (Co. brief, pp. 8-12). But the court below is explicit on this point:

> "The Company assured the Union that no jobs had been promised at Upland and that *all applications would be given equal consideration*, including such factors as age, health, qualifications, and prior employment records." (Pet., p. 40a; emphasis added).

As to Question No. 3, the Company claims our position is based on the erroneous view that the Company never once swerved from its position that the employees it considered lazy or guilty of misconduct would definitely not be retired (Co. brief, pp. 18-19). Here, too, the court below was explicit:

> "The Company's position was that it would give consideration to any Anderson employee who applied at Upland, with retention of seniority for all those hired, but would not 'guarantee' transfer, because some of the employees at Anderson were physically unable to perform a full day's work; others, although physically capable, had not been delivering a full day's work; and still others had disqualified themselves from employment because of objectionable conduct during the strike which the Union had initiated in November, 1964, when negotiations on the original Anderson contract had broken down." (Pet., pp. 39a-40a).
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> * * * * *
>
> "The Company had a well-defined position on transfers, which it stated, explained and discussed at great length. *This position did not change throughout the bargaining*, but such a course is not unlawful [footnote omitted]". (Pet., p. 41a; emphasis added).

obligation to recognize the uncertified member, provided he recognizes the certified. The Board and the Company agree that this ground is original with the court below and was not one upon which the Board rested. Moreover, both decline to defend the ground, taking the position, instead, that the court's alternative ground provides adequate support for its ruling (Bd. brief, p. 15, n. 7; Co. brief, p. 13, n. 2). That the Board, short of defending the rule, should not even express agreement with it implies that it regards the rule as erroneous. It is now, however, a part of the federal labor law, and will so remain unless reviewed and reversed by this Court.

Ordinarily, where a court of appeals, in affirming a Labor Board decision, does so on the basis of a ground the Board did not employ, resolution of any implied conflict between the Board and the court over the court's ground can await a later case posing the same issue in which the Board can adopt or reject the court's ground. In the instant case, however, time is of the essence. As we noted in the petition (pp. 16-17), without demurrer from the Board or the Company, bargaining relationships in which the bargaining agent is a joint agency consisting of an international and its local, only one of whom is certified, are commonplace; and, until now, it has been generally assumed that both members of the bargaining agency must be recognized, the uncertified as well as the certified. The decision in this case casts a definite shadow over all such bargaining relationships. It is not hard to imagine situations in which the employer, on good terms with the international, but on bad with the local, which happens to be uncertified (or vice versa), sits down to bargain a new contract and insists that it is not going to recognize or bargain with the uncertified local, citing this case.

The country has labor problems enough, we submit, without needlessly jeopardizing a host of well-established bargaining relationships from which we could otherwise expect responsibility and stability.

2.

Moreover, the Board's brief in opposition confirms that the circuit court's alternative ground for excusing the Company from recognizing the Local at the new location (that the Local did not represent a majority there) presents a question of federal labor law almost as important as its first ground.

In its brief, the Board acknowledges that there *are* situations in which it *does* require the employer to continue recognizing the union after a significant change which results in his hiring a new work force, less than a majority of whom are old employees and union members: where the change is (1) a sale or other transfer of the operations, or (2) a relocation of the plant—provided, in both cases, the change occurs during the term of a collective bargaining agreement, or the first year of the union's certification. In such situations, the public's interest in industrial stability and in allowing unions a fair chance to achieve their bargaining aims requires that the changes and the new work forces they result in not be taken as occasions for questioning the union's majority status, the Board maintains (Bd. brief, pp. 14-15). We agree.

But the instant case differs from these situations only in that the change that resulted in the new work force occurred after the expiration of the old contract and before a new one had been agreed to, rather than during the term of the contract. Had the relocation here occurred *after* a new contract had been negotiated for the old location, the

Board would not have taken the move and the new work force hired at the new location as cause for questioning the Local's majority. Because it happened between contracts (when the need for "stability" and "fairness" was even greater), the Board refused to require continued recognition. We submit that this paradox requires review.

Moreover, the Board's rule makes it virtually riskless for an employer who is willing to spend some money, to rid himself of his employees' union. Between contracts, all he need do is move his plant to a new location beyond easy commuting distance, hire a new work force, and refuse to recognize the union there on the ground that it lacks a majority. Since there is no contract in effect and the union's certification year has long since expired, the Board, under the rule of this case, would excuse him from further recognition.

CONCLUSION

So that the conflict between this decision and the Second Circuit's in *Cooper Thermometer v. NLRB*, 376 F. 2d 684, 687-88 (1967), may be resolved, and the other important questions of federal labor law presented by this decision reviewed, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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